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PRELIMINARY STATEMENT

Petitioner Roger Keith Coleman respectfully submits this reply in support of his Petition for a Writ of Certiorari. The Petition makes clear that certworthy issues are presented for review. The Commonwealth distorts and trivializes these issues by characterizing the district court's opinion on the motion to dismiss as a ruling on the merits and a resolution of the disputed facts while hiding behind the one-day late filing of Coleman's appeal to avoid proper consideration of his claims.

The Court should grant certiorari to decide the substantial federal questions at issue in Coleman's case: First, under the Fourth Circuit's holding, a state may arbitrarily deprive an individual of a state-created liberty interest without violating federal due process. Second, the circuits are split on the question of whether Harris v. Reed allows a federal court to examine extrinsic evidence to determine whether an ambiguous state court order constituted a decision on the merits of a petitioner's federal claims. Third, the circuit courts disagree about whether Murray v. Carrier means that conduct by a post-conviction attorney, no matter how ineffective, can never constitute cause to justify waiver of a procedural default.

I.

COLEMAN'S FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS ARBITRARILY DENIED A STATE-CREATED LIBERTY INTEREST TO JURY UNANIMITY ON THE AGGRAVATING CIRCUMSTANCES.

The Commonwealth's attempt to argue that Coleman's federal due process, capital sentencing claim is "constitutionally irrelevant" simply misapprehends his claim. See Respondent's Brief ("Resp. Br.") at 7. Coleman does not contend that he had a federal substantive right to unanimity on the aggravating circumstances; rather, he argues that he was arbitrarily denied his state-created entitlement to juror unanimity as to the aggravating circumstances. Arbitrary denial of a state-created liberty interest violates federal due process. See Hicks v. Oklahoma, 447 U.S. 343 (1980); Petition for a Writ of Certiorari ("Ptn.") at 9-10.[1]

1. Respondent's misconstruction of Coleman's due process is highlighted by his mistaken invocation of the Court's "new rule" principle. Resp. Br. at 9 n.4. The new rule principle states that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 109 S. Ct. 1060, 1075 (1989). The constitutional rule at issue here is the due process right enumerated in Hicks v. Oklahoma, not a claim like that raised in Lowenfield v. Phelps, 484 U.S. 231 (1988). Hicks was decided in 1980, prior to Coleman's trial and appeal.

Respondent's argument is based on the flawed premise that Virginia law does not require unanimity as to a particular aggravating circumstance before a death sentence may be imposed. Resp. Br. at 7-8. Although the Virginia Supreme Court has never explicitly held that unanimity is required, Virginia precedent requires such unanimity. In Smith v. Commonwealth, 219 Va. 455, 472, 248 S.E.2d 135, 145 (1978), cert. denied, 441 U.S. 957 (1979), which reviewed the Virginia sentencing scheme, the Virginia Supreme Court stated that the "jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense." The jury must therefore provide a "recitation of a finding of either 'dangerousness' or 'vileness.'" Id. at 472, 248 S.E.2d at 145-46 (emphasis added).

Although the Smith court did not discuss the way in which unanimity should be ensured, two justices in a subsequent case stated that a verdict form identical to that used in Coleman's case violated Virginia law because unanimity as to an aggravating circumstance was not guaranteed. Quintana v. Commonwealth, 224 Va. 127, 152-55, 295 S.E.2d 643, 656-57 (1982) (Poff, J., joined by Stephenson, J., concurring in part and dissenting in

part), cert. denied, 460 U.S. 1029 (1983).[2] Justice Poff reasoned that unanimity was required because:

> It is axiomatic that a jury's verdict in a criminal case must be unanimous. Va. Const., art. I, § 8, Rule 3A:24(a). When the legislature conditions a penalty upon [aggravating circumstances], a jury's verdict is not unanimous unless its findings are unanimous. Id.

The Smith decision and Justice Poff's opinion in Quintana are cited to as supporting authority for Virginia Model Jury Instruction 34.130, which ensures unanimity.[3]

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2. The Quintana majority did not reach the unanimity issue because the appellant had ratified the verdict form at trial and raised the issue only in his brief to the Virginia Supreme Court. Quintana, 224 Va. at 148, 295 S.E.2d at 653 n.6.

3. Va. Model Jury Instruction 34.130. This instruction provides four "alternative jury verdicts" and instructs the jury to "[c]ross out any paragraph, word or phrase which you do not find beyond a reasonable doubt." The four alternative jury verdicts are: (1) the jury found dangerousness and vileness, and sentences the defendant to death; (2) the jury found dangerousness and sentences the defendant to death; (3) the jury found vileness and sentences the defendant to death; or (4) the jury sentences the defendant to life imprisonment. The case cited by respondent, Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980), is not to the contrary. Clark rejected a challenge by the defendant that the jury instruction -- which had not been objected to at trial -- failed to clarify which subpart of the "vileness" predicate the jury found. Neither Clark nor any other Virginia Supreme Court case has found that a sentence of death could be imposed without juror unanimity as to either the vileness or dangerousness predicate.

Justice Poff noted that prior Virginia cases had ensured unanimity either through clarifying jury instructions or jury polling. Quintana, 224 Va. at 154 n.*, 295 S.E.2d at 657 n.* (citing Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980) (a clarifying jury instruction) and (James D.) Briley v. Commonwealth, 221 Va. 563, 577, 273 S.E.2d 57, 66 (1980) (juror polling)). Subsequent cases have similarly ensured unanimity. See, e.g., Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985) (verdict form used "and" not "or"), cert. denied, 478 U.S. 1010 (1986); Frye v. Commissioner, 231 Va. 370, 394, 345 S.E.2d 267, 284 (1986) (verdict form and juror polling). In Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, cert. denied, 109 S. Ct. 3201 (1989), a case on which respondent relies, the court also assured unanimity by polling the jury.

In short, Virginia law requires unanimity as to the aggravating circumstance or circumstances used to impose the sentence of death. Arbitrary denial of that right to Roger Coleman violated due process.[4]

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4. Any procedural default arising out of Coleman's trial counsel's failure to raise the sentencing issue at trial and on appeal should be waived. Counsel's failure to do basic research into Virginia capital sentencing law constitutes ineffective assistance of counsel that justifies waiver of the procedural
(continued...)

II.

THE VIRGINIA SUPREME COURT'S ORDER DISMISSING COLEMAN'S APPEAL WOULD HAVE BEEN FOUND AMBIGUOUS UNDER THE PRECEDENT OF OTHER CIRCUITS.

A. The Circuits Are Split As To What Constitutes An Ambiguous Decision.

The conflict among the circuits with respect to the application of Harris v. Reed, 489 U.S. 255 (1989), does not concern the proper federal court treatment of an ambiguous state decision, but rather what constitutes an ambiguous state decision and what evidence, beyond the opinion itself, a federal court may use to decide whether or not the decision is ambiguous.[5] By using extrinsic

---

4.(...continued)
default. See Hyman v. Aiken, 824 F.2d 1405, 1416 (4th Cir. 1987). The Quintana opinion, which was issued a year before the decision in Coleman's appeal, should have been relied upon by Coleman's counsel on appeal.

5. The Commonwealth's assertion that Coleman is bound by prior concessions is belied by its own submission. While the Commonwealth's Brief in Opposition quotes a sentence from a prior submission by Coleman out of context, the appendix attaching the relevant portion of the prior submission reveals that Coleman conceded nothing. Resp. Br. at 10; Resp. Br. App. at 4-5. The petition stated that the Virginia Supreme Court dismissed the appeal of Coleman's state habeas corpus petition, "apparently because the Notice of Appeal was not [timely] filed." (Emphasis added.) A footnote to that sentence noted:

(continued...)

evidence to explain away the ambiguity in the Virginia Supreme Court's order, the Fourth Circuit has put itself on the wrong side of that conflict.

Because Harris sought to conserve federal judicial resources and preserve the integrity of the state courts by preventing federal court second guessing of state procedural default questions, courts in the Second, Third, Sixth, and Ninth Circuits have construed the Harris plain statement rule to mean that a decision is ambiguous -- and therefore must be presumed to be on the merits -- unless its reliance on procedural default is clear on its face. Cf. Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("the independence of [the] alleged state ground [must be] apparent from the four corners of the opinion"). See Ptn. at 24-31.[6]

On its face, the Virginia Supreme Court's summary order is clearly ambiguous. The order does not mention procedural default or the fact that the notice of appeal was filed one day late. It does not even cite Virginia Rule 5:9 (the rule relied on by the Fourth Circuit in its interpretation of the order) or Saunders v. Reynolds, 214 Va. 197, 204 S.E.2d 421 (1974) (the Virginia case on which the Commonwealth relies in its attempt to explain what the Virginia court was doing). Nor does it state that the appeal was being dismissed "for the reasons stated in the Commonwealth's motion to dismiss." Rather,

---

5.(...continued)

> The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner can only assume that the court adopted the Commonwealth's position as articulated in its briefs. (Emphasis added.)

Harris v. Reed rejected such assumptions. It required that state courts' reliance on procedural default be clear and express. As the quotes above demonstrate, petitioner has never conceded that the Virginia Supreme Court's order dismissing his appeal was clear and express.

---

6. The conflict as to whether extrinsic evidence as to state law, a prior state court decision or the arguments presented to the state court may be used to help interpret an ambiguous state court decision has deepened in the months since Coleman prepared his petition for certiorari. Compare, e.g., Barker v. Estelle, 1990 U.S. App. LEXIS 15800 (9th Cir. Sept. 11, 1990)(following Nunnemaker v. Ylst, 904 F.2d 473 (9th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3054 (U.S. July 9, 1990) (No. 90-68)) and Johnson v. Burke, 903 F.2d 1056, 1060 (following Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989), petition for cert. filed, No. 90-5192 (U.S. July 11, 1990)), with Prihoda v. McCaughtry, 1990 U.S. App. LEXIS 14074 (7th Cir. Aug. 14, 1990) (disagreeing with 9th Circuit and following Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1989) petition for cert. filed, No. 89-7593 (U.S. May 21, 1990)). See also Boulware v. Erhard, 1990 U.S. Dist. LEXIS 11028 (E.D. Pa. Aug. 21, 1990).

the order listed all the papers filed by both parties -- papers that included briefs on the merits as well as on procedural default -- and, "[u]pon consideration whereof," granted the Commonwealth's motion and dismissed the appeal.

The Commonwealth nonetheless contends that "[a]n order which expressly grants a motion to dismiss, the sole basis of which was the untimely filing of a notice of appeal, clearly satisfies the plain statement rule set forth in Harris." Resp. Br. at 11. The Fourth Circuit, bolstered by its peek at Virginia Rule 5:9, apparently accepted that logic. But that position directly conflicts with a line of Sixth Circuit cases holding that denials without opinion of motions to file delayed appeals cannot be presumed to be based on procedural grounds. See, e.g., Johnson v. Burke, 903 F.2d 1056, 1059 (6th Cir. 1990) (rejecting state's assertion that denial of an application to file a delayed appeal is "inherently a decision that relies on procedural grounds"); Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989).

Petitioner submits that the Sixth Circuit's position is the correct reading of Harris. Harris rejected the view that federal courts should attempt to cure ambiguity by examining the arguments presented to the

state court. 109 S. Ct. at 1041 n.4, 1044. A summary grant or denial of a motion, no matter how "inherently procedural," cannot be a "clear and express" statement of reliance on procedural default, unless the order states that relief is denied "for the reasons stated in the State's motion papers."[7]

B. The Court Should Grant Certiorari To Protect The Uniformity Of Federal Law.

Contrary to the Commonwealth's assertion, there are "serious and important" reasons to grant certiorari in this case. In the few months since Coleman prepared his certiorari petition, approximately 50 additional federal court opinions have cited Harris, bringing the total to well over 160 in the year and a half since Harris was issued. The circuits' disagreement as to whether evidence beyond the face of a state court decision may be considered to determine whether the decision is ambiguous guarantees that the lower federal courts will continue to issue widely divergent decisions in this area. The opportunity for federal habeas review of federal constitutional

7. Or, as Harris itself suggests, "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" Harris, 109 S. Ct. at 1045 n.12.

claims will thus continue to vary depending on where a prisoner is incarcerated.

Uniformity of federal law is the fundamental goal of the plain statement rule. See Michigan v. Long, 463 U.S. at 1040 ("there is an important need for uniformity in federal law, and . . . this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion"). Nowhere is the need for uniformity more pressing than in a case such as this, where Roger Coleman has been sentenced to death. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all"). The Court should grant certiorari in this case to end the lack of uniformity created by the circuits' differing interpretations of the Harris v. Reed plain statement rule.

III.

COLEMAN'S STATE HABEAS COUNSEL'S ONE-DAY LATE FILING OF AN APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL AND JUSTIFIES WAIVER OF THE PROCEDURAL DEFAULT.

The Commonwealth fails even to address the petitioner's demonstration that by prohibiting ineffec-

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OF COUNSEL

September 18, 1990

FEDERAL EXPRESS

Joseph Spaniol, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center for the Commonwealth of Virginia, Respondent
No. 89-7662

Dear Mr. Spaniol:

Enclosed for filing is the Reply Brief in Support of Petition For A Writ Of Certiorari in the above-captioned case. Petitioner has previously filed a motion for leave to proceed in forma pauperis.

Sincerely yours,

Daniel J. Goldstein

Enclosure

cc: Donald R. Curry, Esq. (by U.S. Mail and Federal Express)

tiveness of counsel claims from being raised until collateral review, Virginia has erected an external impediment to a defendant's assertion of those claims in the state courts during proceedings where the defendant is constitutionally entitled to counsel. As a result, ineffective assistance of post-conviction counsel must constitute cause at least as to those claims.

A refusal to recognize cause under these circumstances would be contrary to the Court's statement in Murray v. Carrier that procedural default rules should be enforced in the same manner whether the default occurred on direct review or in collateral proceedings. 477 U.S. 478, 490-91 (1986). If default rules are to be enforced similarly at all stages, the decision to waive a default should be based on the same standard. Attorney conduct that justifies waiver of a default on direct review should also justify waiver on collateral review.

In Murray, the Court did not decide whether the conduct of an attorney who was not constitutionally required could constitute cause whenever that conduct fell "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). The Court stated that "so long as a defendant is represented by counsel whose performance is not consti-

tutionally ineffective under the standard established in Strickland v. Washington, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 477 U.S. at 488.

Murray's invocation of the Strickland standard in the context of a cause and prejudice analysis has left lower courts without clear guidelines for waiving defaults caused by ineffective post-conviction counsel. In Coleman's case, the Fourth Circuit ruled that an attorney's conduct can constitute cause only if the attorney was constitutionally required. App. at a14-15; see also Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988), cert. denied, 109 S. Ct. 1168 (1989); Whitten v. Allen, 727 F. Supp. 28 (D. Me. 1989).[8] Under that approach, attorney conduct during collateral proceedings, no matter how egregious, will never constitute cause. By contrast, other courts have found that when ineffective assistance of counsel is assigned as cause and not as a substantive right, the attorney whose conduct is at issue need not be constitutionally required. See, e.g., Shook v. Clarke, 894 F.2d 1496 (8th Cir. 1990); Madyun v. Young, 852 F.2d

8. Toles v. Jones, 888 F.2d 95 (11th Cir. 1989), which held that cause could not be satisfied by the ineffectiveness of coram nobis counsel, was vacated and a petition for rehearing en banc was granted. 905 F.2d (11th Cir. June 7, 1990).

1029, 1033 n.3 (7th Cir. 1988) (requiring a constitutional right to counsel for instances in which deficient performance can be cause is based upon a "non sequitur").[9]

Contrary to the Commonwealth's assertions, a finding of cause is not the same as finding a right to counsel for collateral proceedings. Resp. Br. at 14-15. Finding cause simply allows a petitioner to raise his federal claims in federal court and does not create any new substantive rights or remedies. The requirements for a finding of cause therefore need not be as strict as the standard applied in deciding if an independent constitutional right exists. Indeed, the Court has previously recognized that counsel's actions short of constitutional violations may constitute cause. See Reed

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9. Respondent cannot avoid the Eighth Circuit precedent by arguing that no waiver of the default was allowed in Harper v. Nix, 867 F.2d 455 (8th Cir.), cert. denied, 109 S. Ct. 3194 (1989). Resp. Br. at 13. As the Eleventh Circuit has recognized, the Eighth Circuit has applied an "ineffective assistance analysis to determine whether the failure of an attorney to raise an issue on a state collateral challenge constitutes cause." Johnson v. Dugger, 1990 U.S. App. LEXIS 14759 (11th Cir. Aug. 21, 1990). The Eighth Circuit's own interpretation of the Harper precedent in Shook and Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989), makes clear that the Harper decision stands for the proposition that, if post-conviction counsel's performance is ineffective, the default will be waived. That the Harper court found counsel's conduct to be adequate does not alter the analysis.

v. Ross, 468 U.S. 1 (1984) (recognizing that cause could be satisfied when an attorney failed to raise a "novel" legal theory without any suggestion that the attorney's failure was an independent constitutional violation).

The Commonwealth wrongly suggests that the Fourth Circuit considered the merits of Coleman's underlying claims. Resp. Br. at 12. The Fourth Circuit undertook no such inquiry. Although it concluded that enforcing the default would not result in a "fundamental miscarriage of justice," this determination does not approach a full review of the merits or even a statement that Coleman suffered no prejudice as a result of that default. See Murray v. Carrier, 477 U.S. at 496 ("fundamental miscarriage of justice" is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); App. at a15.[10]

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10. Coleman has maintained his innocence from the outset and included facts supporting this claim in his federal habeas petition.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for a Writ of Certiorari, Petitioner Roger Keith Coleman respectfully requests that his Petition for a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
September 18, 1990

Respectfully submitted,

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Affidavit of Service

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DANIEL JOEL GOLDSTEIN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am associated with the law firm of Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022.

2. I caused a copy of the annexed Reply Brief In Support Of Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case captioned Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia, Respondent to be served by first-class mail, postage pre-paid, on Donald R. Curry, Esq., Attorney for Respondent, 101 No. Eighth Street, Richmond, Virginia 23219 (telephone: (804) 786-2071) on the 18th day of September, 1990.

3. I declare under penalty of perjury that the foregoing is true and correct.

Sworn to before me this
18th day of September, 1990

THELMA GARVIN
Notary Public, State of New York
No. 03-4706714
Qualified in Bronx County
Commission Expires